APPEAL NO. 92008

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 16, 1991, a contested case hearing was held in (City), Texas, with (hearing officer) presiding. (Ms. D) determined that the employee, (employee), the appellant herein, failed to prove by a preponderance of the evidence that she sustained a compensable injury on (date of injury), in the course and scope of her employment as a cook at (employer) restaurant, operated by ("employer"). The appellant seeks review of the hearing officer's determination that no injury to the back or the finger occurred on the job, and argues that the medical evidence presented by the appellant, as claimant's exhibits 1 and 3, carry her burden of proof. The respondent replies that the findings of fact and conclusions of law of the hearing examiner are supported by sufficient evidence, and asks that the decision be upheld.

DECISION

We find that the evidence supports the findings and conclusions of the hearing officer, and affirm her decision.

At the beginning of the hearing, the parties agreed that the issue to be resolved was whether the appellant was injured within the course and scope of her employment, although a benefit review conference report indicated that the issue left unresolved was whether appellant was intoxicated at the time of her injury. Both parties disagreed with this phrasing of the issue in the report, and agreed that the matter of intoxication was a fact considered in whether a compensable injury occurred at all.

Appellant testified that she worked for employer, primarily as a cook. She said that she walked to work, and began work at around 5:00 p.m. on (date of injury). She said that she had not eaten or had an alcoholic beverage the whole day. She testified that she had never consumed alcoholic beverages. She stated that she frequently eats spicy oriental food. On the evening in question, she went into the cooler at the restaurant to put an aluminum pan of chicken on a shelf. She stated that she asked "another employee" to help her because the pan was heavy, weighing about 40-50 lbs., and that he refused and told her that was her job. She said that the shelf on which she was to put the pan was above her head, and, that to reach it she had to stand on a plastic milk crate as if it were a stool. She said that the shelf in question had only room enough to squeeze two pans, one for mild and one for spicy seasoned chicken, next to each other. Because the shelf was high and there was a problem with getting one's finger caught, she "tossed" the pan quickly onto the shelf, and nevertheless caught her entire left hand between the pans. When she pulled her hand out, she stated that she fell backwards off the "stool" and landed flat on her back. She said that the edge of the aluminum pan was sharp and she cut her finger on the edge of the pan. There were no witnesses and no one was with her in the cooler at the time. She stated that she told (RN), the crew manager, that she hurt herself, and he said that she would need to clock out and go home. She stated that she asked to finish another hour,

and he said he would drag her out if she didn't go home.

She stated that the next day her back hurt so badly that she could hardly get out of bed, and her hand was swollen so that it felt like a boxing glove. She went to the emergency room at (Hospital), where she had been transported by a neighbor, ("Mr. P"). She stated that her little finger was broken. She indicated that she had since seen another doctor for her back and received some x-rays. The only medical records in evidence were the initial medical emergency room report and a bill for some x-rays to her finger, both for services rendered (date). These indicated that she saw ("Dr. B") on (date); that a deformity of her little finger was observed; and, that she had a hyperextension of her finger and a soft tissue injury. Patient instructions on the emergency room record say "keep in splint 1 wk." The medical records make no findings or diagnosis of a back injury. Appellant acknowledged that she gave a recorded statement to the respondent's adjustor which was admitted into evidence without objection and which indicated that appellant described her injury as involving only the finger. The back is not mentioned in the statement. Appellant's explanation for this during the hearing was that she answered only the questions asked and that her telephone does not work real well and she could not always hear the adjuster. In her statement, appellant also indicated to the adjuster that all of her co-workers were drinking and were abusive, and, that she left early because after she reported her accident, her supervisor screamed at her and was verbally abusive. In her testimony at hearing, she did not indicate that co-workers were drinking on the job or that her supervisor was verbally abusive.

Mr. P, who was 86, testified as an adverse witness called by appellant. He stated that appellant had lived with him for three months but that she had moved to another apartment prior to (date of injury). He stated that he drove appellant places because she did not have a car. He said that he drove her to the emergency room for treatment of her finger and that she told him about a week later that she fell down in her apartment when she was drinking and broke it. He did not recall the date that this happened. He stated that she drank beer.

("Mr. N"), who had been the crew manager for (employer), but who was employed elsewhere at the time of the hearing, stated that he was on duty (date of injury), and that, as far as he knew, appellant did not injure herself. He stated that that night, another employee named (another employee) asked her for money, and that she cursed him and yelled at him. She was generally cursing, and burned the chicken because it was left in the cooker too long. He said that she smelled like alcohol. He told her to calm down, and eventually asked her to leave. At first she laughed, but when he said, "I'm serious," he stated that she got upset, "stormed up to the front and clocked out" at the cash register, and then left by the back door. He stated that she did not ask him to help her that night with a tray of chicken and that she said nothing about being injured. He said that he would have helped with chicken trays, if asked, because that was part of his job. He stated that she left at 9:06 p.m. He stated that she had been a good employee until some days before the incident in question.

("Ms. O"), who did not describe her job duties but indicated she had hiring and firing power, testified about the cooler. She stated that she got racks of chicken out of the cooler every day. She stated that there were three skinny racks in the cooler, like bread racks in the grocery store, where the chicken was stacked. She said the racks were moveable on rollers. She stated that there was one pan on each shelf of the rack, and there were six shelves on each rack, so that there were 18 pans of chicken in the cooler at any one time. The pans were stacked on top of each other, one to a shelf. She stated that a separate area, the batter fry area, had only one shelf that accommodated just two pans, one each for mild and spicy, and that these fit lengthwise on the shelf. She stated that she left work at 5:30 p.m. on (date of injury), and didn't really see appellant that night. However, she testified that on other occasions, it was noticeable to her that appellant had been drinking. She stated that at these times she could smell alcohol on appellant's breath, that appellant would become clumsy and drop things, or forget to turn on the food timer. Over objection, she stated that appellant's sister, who also worked for the employer, told her that appellant had a drinking problem.

Another co-worker, ("Mr. CO") testified that he worked on (date of injury), and that he had told her to get away from him because she had alcohol smell on her breath. He stated that she had cursed another co-worker who jokingly asked for money, that she was throwing biscuit pans around, and that when she continued this after being warned, she was sent home by Mr. N. Mr. CO stated that the cooler opened in two places, and that it came out in the back in the fryer area. The other opening was near the dish washing area, where he worked.

Several co-workers testified that appellant came in the next morning, Thursday, (date), with her hand wrapped with a scarf. The supervisor on duty that morning, ("Ms. R") also testified that appellant came in between 11:00 and 12:00 that morning with her hand wrapped in a scarf, and showed her both hands. She stated that neither hand looked swollen or discolored to her. Ms. R stated that appellant said she hurt her hand putting a pan of chicken up on the rack. She advised appellant to see a doctor. That afternoon, around 5:00 p.m., appellant returned and brought a note from the doctor saying she could return to work the following Thursday. Ms. R stated that each rack in the walk-in cooler held seven pans and there was no room to put pans side-by-side on a rack shelf. She stated that it had been reported to her by Ms. O the week before that Ms. O suspected appellant had come to work drunk, and that Ms. R put appellant on her shift in order to observe for herself. However, she testified that she really didn't have a chance to see for herself because the incident happened very shortly thereafter. Finally, a written statement from the cashier, ("Ms. AO"), states that she worked (date of injury). Her statement corroborates other testimony about appellant's behavior. She also states that on (date), appellant came to work with her hand wrapped up.

The hearing officer is the sole judge of the weight, materiality, relevance, and credibility of the evidence. Art. 8308-6.34 (e). His decision should not be set aside because different inferences and conclusions may be drawn on review, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co.

of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.- Amarillo 1974, no writ). The claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.- Beaumont 1976, writ ref'd n.r.e.). The finder of fact has the right to judge the credibility of the claimant and weight to be given to his testimony, in light of other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.- Amarillo 1978, no writ). A claimant is an interested witness and the trier of fact is not required to accept her testimony. Presley v. Royal Indemnity Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.- Texarkana 1977, no writ). Only if the evidence supporting the hearing officer's determination is so weak, or if the decision is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, is it appropriate for the trier of fact to be reversed on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Montes v. Texas Employers' Insurance Ass'n, 779 S.W. 2d 485 (Tex. Civ. App - El Paso 1989 writ denied). We find the evidence sufficient to support the hearing officer's findings of fact, conclusions of law, and decision.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Joe Sebesta
Appeals Judge